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No. 97-_____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

LYON METAL PRODUCTS, INC., *Petitioner*,

v.

CALIFORNIA BOARD OF EQUALIZATION, *Respondent.*

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California First Appellate District Division Five

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under section 6007 of the California Revenue and Taxation Code, local manufacturer/wholesalers such as petitioner Lyon are assessed a sales tax whenever they make a sale to an out-of-state retailer who directs them to "drop ship" the goods (*i.e.*, deliver the goods directly to the retailer's customer) in California. Local wholesalers, however, have no sales tax liability under section 6007 when they act as a drop shipper for in-state retailers. The following question is presented:

> Whether California's drop shipment rule, imposing sales tax liability on wholesalers when they act as drop shippers for out-of-state retailers, but not for in-state retailers, contravenes the Commerce Clause of the United States Constitution.

CORPORATE LISTING

After the action below was filed, petitioner Lyon Metal Products, Inc. became a Delaware limited liability company, and its name was changed to Lyon Metal Products, L.L.C.

Lyon Holding Co. is the parent company of Lyon Metal Products, L.L.C.

The following entities are non-wholly owned subsidiaries of Lyon Metal Products, L.L.C.:

(1) Durand Products, L.L.C.;

(2) Paltier, L.L.C.;

(3) Remline, L.L.C.;

(4) Riverpoint, L.L.C.

(5) Sycamore Systems, L.L.C.;

(6) T & D Metals, L.L.C; and

(7) Targeted Marketing, L.L.C.

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PETITION FOR WRIT OF CERTIORARI

Lyon Metal Products, Inc. ("Lyon") respectfully petitions for a writ of certiorari to review the judgment and opinion of the Court of Appeal of the State of California, First Appellate District, Division Five.

OPINIONS AND ORDERS BELOW

The order of the Supreme Court of California denying review (App., *infra*, 22a) is unreported. The opinion of the Court of Appeal of California, First Appellate District (App., *infra*, 1a-10a) is reported at 58 Cal.App.4th 906, 68 Cal.Rptr.2d 285 (1997). The statement of decision of the Superior Court of California, City and County of San Francisco (App., *infra*, 11a-21a) is unreported.

JURISDICTION

The judgment of the Court of Appeal was entered on October 24, 1997. On November 18, 1997, the Court of Appeal denied Lyon's timely petition for rehearing. The California Supreme Court denied Lyon's timely petition for review on January 14, 1998 (App., 22a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, section 8, clause 3 of the United States Constitution confers upon Congress the power to "regulate Commerce . . . among the Several States."

During the relevant period, section 6007 of the California Revenue and Taxation Code provided as follows:

> A "retail sale" or "sale at retail" means a sale for any purpose other than resale in the regular course of business in the form of tangible personal property.
>
> The delivery in this State of tangible personal property by an owner or former owner thereof or by a factor, or agent of such owner, former owner or factor, if the delivery is to a consumer or person for redelivery to a consumer, pursuant to a retail sale by a retailer not engaged in business in this State, is a retail sale in this State by the person making the delivery. He shall include the

retail selling price of the property in his gross receipts.[1]

STATEMENT OF THE CASE

Lyon is a leading manufacturer and wholesaler of steel equipment and office furniture. Reporter's Transcript ("RT") 10:9-11; 10:20. Its principal place of business is located in Aurora, Illinois (Petitioner's Appendix ("PA") 97), but Lyon maintains sales personnel in California and a warehouse in the City of Industry, California. RT 17:1-8.

On August 14, 1994, respondent California Board of Equalization (the "Board") issued a tax deficiency notice to Lyon under California Revenue and Taxation Code section 6007.[2] Respondent's Appendix ("RA") 11. The notice was for non-payment of sales tax based on eleven drop shipment sales made by Lyon to out-of-state retailers between 1987 and 1990. RT 11:3-17; PA 1.

In each of the eleven drop shipment sales, the retailer, an out-of-state dealer, contracted with Lyon to purchase goods for resale. RT 20:28-21:1. In each sale, Lyon agreed, for the convenience of the retail dealers and their customers, to ship the goods directly from its warehouse in Industry, California to the dealers' customers located within California.

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[1] Non-substantive, editorial amendments were made to section 6007 in 1992. 1992 Cal. Stat., ch. 902, § 1. Respondent's tax treatment of drop shipments under the amended statute remains the same. Thus, the Court of Appeal relied on the amended statute in reaching its decision below. App., 3a.

[2] Unless otherwise indicated, all statutory references are to the California Revenue and Taxation Code.

RT 16:2-22. All deliveries were made by common carrier F.O.B. Lyon's plant in Industry. RT 16:23-17:11.

Lyon and its dealers dealt at arms' length and for their respective accounts and did not act as each other's agent. RT 18:19-26. Lyon was not involved in negotiating, and did not in fact know, the terms or price of its dealers' resales of the goods to their customers in California. RT 15:19-16:1.

As the trial court found (RA 91:10-15), the evidence was uncontroverted at trial that all of the transactions involved sales by Lyon for resale. Hence, none was a "retail sale" within the meaning of the first paragraph of section 6007. Moreover, the Board admitted that all of the Lyon dealers were "retailers." PA 67, 72.

After paying $17,413.86 for the alleged sales tax deficiency (PA 101, ¶ 13, RA 20) and exhausting administrative remedies (PA 107-114), Lyon timely filed an action against the Board for a sales tax refund in California Superior Court. *Compare* PA 104, ¶ 19 *with* RA 20, ¶ 1. At both the administrative level and in the trial court, Lyon asserted as a ground for its refund claim that section 6007 violated the Commerce Clause of the United States Constitution. PA 102-03, 111.

After a court trial, judgment was entered for Lyon for the entire amount of the refund sought. RA 100-101. In its statement of decision, the trial court relied on this Court's decisions in *Complete Auto Transit, Inc. v. Brady* 430 U.S. 274, 279 (1977), and *Quill Corp. v. North Dakota* 504 U.S. 298, 311 (1992), in determining that section 6007 as applied by the Board to Lyon's eleven drop shipments violated the Commerce Clause. App., 16a-20a.

The Court of Appeal reversed, rejecting the trial court's construction of section 6007 and Lyon's constitutional arguments and directing that judgment be entered in favor of the Board. App, 1a-11a. On the constitutional issue, the appellate court ruled that the trial court committed error in holding that "the drop shipment rule in section 6007 was unconstitutional because it allegedly discriminates against interstate commerce." App., 6a-7a. The Court of Appeal "failed to perceive any unconstitutional discrimination" because the same amount of tax would have been imposed on the sales transaction if it had occurred entirely within California. App., 7a.

In its published decision, the Court of Appeal analyzed in detail whether, under the Commerce Clause, section 6007 created an unconstitutional burden upon interstate commerce. Purporting to apply the four-part test articulated by this Court in *Complete Auto*, the Court of Appeal concluded that "[t]he tax in question here satisfies every one of those conditions" (App., 8a):

> As to the first factor, the goods were stored in a California warehouse and were delivered from there to California consumers, so there was a sufficient nexus with California. Second, there is no unfair apportionment or double taxation; all relevant events occurred in California, and the transactions will be taxed only once by California. Third, there is no discriminatory taxation, because the same tax will be charged on the transactions, and the same tax will ultimately be paid by the retail customers, whether as sales tax or use tax, regardless of the parties' residences. Finally, Lyon concedes the fourth factor is present here, since the tax is fairly related to services provided by the taxing state. Therefore, the

tax in issue here is valid. *Id.* (citing *Complete Auto*, 430 U.S. at 279.)

The California Supreme Court denied Lyon's petition for review on January 14, 1998.

REASONS FOR GRANTING THE PETITION

Petitioner Lyon respectfully petitions this Court to grant certiorari in this case to resolve a recurrent and important federal question that affects the accommodation of state and federal interests under the Commerce Clause of the United States Constitution. No federal precedent presently exists on the specific question presented by this petition. However, the opinion by the Court of Appeal conflicts in principle with numerous decisions of this Court. Hence, review by this Court is necessary to resolve this unsettled question and to correct the erroneous conclusions advanced by the court below.

A. The Drop Shipment Rule as Codified in Section 6007 Presents a Recurrent, Important and Presently Unresolved Federal Question.

The District of Columbia and some forty-five states, including California, have adopted a sales and use tax scheme.[3] Of these, at least nineteen jurisdictions in addition to California have enacted some form of codification of the

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[3] *See generally* Tax Mgmt. (BNA), *Sales and Use Taxes: Drop Shipment Transactions*, § 1340.05, pp. 1340.05.C.1 - 1340.05.YY.21.C ff.

drop shipment rule.[4] Except for the opinion below, however, no reported case in any of these other jurisdictions has squarely confronted the question presented by this petition. None has thus upheld a statute against a Commerce Clause challenge that, like section 6007, discriminates on its face against local wholesalers who act as drop shippers for out-of-state as opposed to in-state retailers.[5]

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[4] Connecticut (Conn. Gen. Stat. § 12-407(3) (1997)), the District of Columbia (D.C. Mun. Regs. §§ 414.1, 414.2, 414.7 (1998)), Florida (Fla. Stat. Ann. § 212.06 (West 1997); Fla. Reg. Rule 12A-1.091(10) (1998)), Hawaii (Haw. Rev. Stat. § 237-13 (1997); Haw. Admin. R., Rule § 18-237-13-02 (1998)), Idaho (Idaho Code § 63-3609 (1997)), Kentucky (Ky. Rev. Stat. Ann. § 139.100 (Banks-Baldwin 1998)), Louisiana (La. Admin. Code tit. 47, § 4351 (1997)), Maryland (Md. Code Ann., Tax--Gen. § 11-401 (1998); Md. Regs. § 03.06.01.14 (1998)), Massachusetts (Mass. Gen. L. chs. 64H and 64I (1998)), Mississippi (Miss. Code Ann. §§ 27-65-101-111 (1997)), Nebraska (Neb. Rev. Stat. § 77-2702.13 (1997), Neb. Reg. 1-006 (1998)), Nevada (Nev. Rev. Stat. Ann. § 372.050 (Michie 1997)), North Carolina (N.C. Gen. Stat. §§ 105-164.5, 105-164.8, and 105-164.28 (Michie 1997)), Oklahoma (Okl. Stat. Ann. tit. 68, § 1352(S)(4) (West 1998)), Rhode Island (R.I. Gen. Laws § 44-18-8 (1997)), South Dakota (S.D. Codified Laws §§ 10-45-1 and 10-45-61 (Michie 1997); S.D. Admin. R. 64:06:01:45 (1998)), Tennessee (Tenn. Code Ann. § 67-6-102 (1997); Rule 1320-5-1-.96), Vermont (Vt. Stat. Ann. tit. 32, § 9771 (1997); Vt. Gov't Reg. § 226-6(I)), and Wisconsin (Wis. Stat. § 77.51(14)(d)(1996)). Ten of these states--Connecticut, Florida, Idaho, Kentucky, Nebraska, Nevada, Oklahoma, Rhode Island, Tennessee and Wisconsin--have statutes substantially similar to section 6007.

[5] The highest court in one of the other nineteen jurisdictions has construed a sales tax statute identical to California's in a manner that avoided the potential imposition of an unconstitutional burden on interstate commerce. *See*

(continued...)

Although the question presented remains unsettled, its importance is increasingly recognized. Sales and use tax treatment of drop shipments has generated substantial interest among leading tax commentators.[6] One commentary has questioned whether facial discrimination against interstate commerce in statutes such as section 6007 will pass muster under the Commerce Clause, observing that statutes that impose sales tax on interstate drop shipment transactions "create two classes of taxpayers and treat them differently, based on whether the transaction is interstate or intrastate."[7]

Moreover, virtually all observers recognize that drop shipments are being used more frequently in business as a structural feature that increases efficiency.[8] Drop shipments

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[5](...continued)
Steelcase v. Crystal (Conn. 1996) 680 A.2d 289. *Cf. VSA, Inc. v. Faulkner*, 485 S.E.2d 348 (N.C.App. 1997) (holding that wholesaler is exempt from liability for drop shipment under state sales tax statute that does not codify drop shipment rule). *See also Steelcase, Inc. v. Director, Division of Taxation* 13 N.J.Tax 182 (1993).

[6] *See, e.g.*, 2 Hellerstein & Hellerstein, State Taxation, *Drop Shipments*, ¶ 18.07B, S18-16 - S-18-18 (1997/9 Cum. Supp.); Tax Mgmt. (BNA), *Sales and Use Taxes: Drop Shipment Transactions*, §§ 1340.01-.03, pp. 1340.01.C - 1340.03.C; H. Michael Madsen & Kimberly L. King, *Interstate Dimensions of the Sales Tax: Third-Party Drop Shipments*, 10 State Tax Notes 1233 (April 22, 1996).

[7] H. Michael Madsen & Kimberly L. King, *supra*, 10 State Tax Notes at 1239 (citing *Armco Inc. v. Hardesty*, 467 U.S. 638 (1984)).

[8] *E.g.*, 2 Hellerstein & Hellerstein, *supra*, ¶ 18.07B, at S-18-18 (1997/9 Cum. Supp.); Tax Mgmt. (BNA), *Sales and* (continued...)

reduce the retailer's cost for inventory and raw materials.[9] Time and money are also saved by the wholesaler's shipping directly to the consumer, as opposed to shipping to the retailer for reshipment to the consumer.[10] Drop shipments are thus becoming an increasingly common feature of modern business practice.

Despite such heightened significance and related concerns about the legality of the drop shipment rule, it is unlikely that a federal court will have an opportunity to address the constitutional issue unless this Court grants review in a state court case presenting the question. Under state tax refund schemes like California's, taxpayers such as Lyon are forced to raise their constitutional defenses to a sales tax deficiency assessment in administrative proceedings before a state administrative agency such as the Board.[11] Where, as here, such defenses are rejected, the taxpayer's sole remedy is to sue for a refund in a suit in which venue lies exclusively in the state trial court.[12]

Accordingly, Lyon's petition represents an opportunity for this Court to resolve an important federal question arising under the Constitution. The constitutionally required result

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[8](...continued)
Use Taxes: Drop Shipment Transactions, *supra*, § 1340.01, at 1340.01.C; H. Michael Madsen & Kimberly L. King, *supra*, at 1239.

[9] *See* Tax Mgmt. (BNA), *Sales and Use Taxes: Drop Shipment Transactions*, *supra*, § 1340.01, at 1340.01.C.

[10] *See* H. Michael Madsen & Kimberly L. King, *supra*, at 1239.

[11] *E.g.*, section 6902.

[12] *E.g.*, section 6933.

is an important corollary to the rule announced by this Court in *Quill Corp. v. North Dakota,* 504 U.S. 298 (1992), that a state has insufficient nexus to impose sales tax on a retail sale made by an out-of-state retailer not engaged in business in the state. Section 6007 represents California's attempt to circumvent this rule by imposing the sales tax against the wholesaler, who is not a party to the retail sales transaction but who is subject to the state's tax jurisdiction.

B. The Decision by the Court of Appeal Conflicts with this Court's Commerce Clause Jurisprudence.

According to this Court's jurisprudence, the Commerce Clause "has long been seen as a limitation on state regulatory powers as well as an affirmative grant of congressional authority." *Fulton Corp. v. Faulkner*, 516 U.S. 325, 330 (1996). In its negative aspect, the Commerce Clause "prohibits certain state actions that interfere with interstate commerce" (*Quill Corp. v. North Dakota,* 504 U.S. at 309), specifically targeting "economic protectionism--that is, 'regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.'" *Associated Industries of Missouri v. Lohman*, 511 U.S. 641, 647 (1994) (quoting *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273-274 (1988)). The Court of Appeal misapplied the four-part test articulated by this Court in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, in evaluating whether, under the Commerce Clause, section 6007 creates an unconstitutional burden upon interstate commerce. The consideration of the constitutional issue by the Court of Appeal is seriously flawed in numerous respects.

1. Section 6007 discriminates against manufacturers who do business with out-of-state retailers.

Most important, section 6007 as construed by the Court of Appeal violates the "strict rule of equality" articulated in this Court's Commerce Clause decisions. *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937). Under this principle of equality, a state cannot, consistent with the Commerce Clause, discourage persons engaged in intrastate business "from plying their trades in interstate commerce" by taxing them more heavily when they do. *Fulton Corp. v. Faulkner*, 516 U.S. at 333. Section 6007 creates such constitutionally impermissible disincentives.

Under the statute, there is a key difference from the perspective of wholesalers and manufacturers like Lyon between drop-shipments involving out-of-state retailers and those involving in-state retailers. In the latter, the California "retailer" is required under sales and use tax law both to include the "sales price" (section 6011) of the goods purchased within its gross receipts (section 6051) and to collect the tax from the purchaser. Section 6203. The "wholesaler" (i.e., Lyon) has no California sales or use tax liability of any kind.[13]

In contrast, in the case of drop-shipments involving out-of-state retailers, the tax, according to the Court of Appeal, is to be paid by the wholesaler (Lyon). The out-of-state retailer is not subject to the tax and has no duty to collect it (*see Quill Corp. v. North Dakota*, 504 U.S. 298), and the wholesaler cannot collect the tax from the purchaser

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[13] See § 6007 (limiting application of second paragraph of former statute to transactions involving "retailer(s) not engaged in business in this State")(emphasis added). *See also* §§ 6091, 6203, 6401.

because the wholesaler and purchaser are not in privity of contract. Cal. Civ.Code § 1656.1.

The Court of Appeal attempted to sustain the statute's facial discrimination on the ground that the same amount of tax assessed in drop-shipments involving out-of-state retailers is charged in transactions that are completely intrastate.[14] The appellate court went so far as to state that its construction of section 6007 was necessary to prevent "reverse discrimination against out-of-state parties" who otherwise would take advantage of a "gaping loophole . . . in favor of out-of-state intermediaries, that the Legislature validly closed." App. at 9a. This reasoning was erroneous.

First, the fact that the amount of the tax is the same is of no significance under the *Complete Auto* test unless "the events on which the interstate and intrastate taxes are imposed . . . [are] 'substantially equivalent'; that is, they must be sufficiently similar in substance to serve as mutually exclusive 'prox[ies]' for each other." *Oregon Waste Systems, Inc. v. Dept. of Env. Quality*, 511 U.S. 93, 103 (1994) (quoting *Armco, Inc. v. Hardesty*, 467 U.S. at 643). In other words, the tax surcharge must be invalidated unless the State can "sho[w] that it advances a legitimate local purpose that

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[14] The Court of Appeal attempts to articulate the principle of equality on the basis that "the same tax will ultimately be paid by the retail customers, whether as sales tax or use tax, regardless of the parties' residences." App. at 8a (emphasis added). However, as previously stated (*see* text accompanying footnote 13, *supra*), Lyon, not the retail customers, is required by the Board to pay the sales tax in interstate drop-shipment transactions, which contrasts with the allocation of the tax burden to "retailers" and their customers in wholly intrastate transactions. Accordingly, the factual premise upon which this aspect of the Court of Appeal's decision purports to be based is without foundation.

cannot be adequately served by reasonable nondiscriminatory alternatives." *New Energy Co. of Indiana v. Limbach*, 486 U.S. at 278.

In this case, the Board is unable to make the required showing of no reasonable nondiscriminatory alternative. All of the transactions in question are subject to a legislatively mandated alternative: enforcement of the use tax against the consumers. *See* § 6201 *et seq.*

Also, to sustain the constitutionality of a facially discriminatory statute such as section 6007, "the actual incidence upon the same class of taxpayers is a necessary condition for a finding that two taxes are complementary." *Fulton Corp. v. Faulkner*, 516 U.S. 325, 340, fn. 6 (citing *Henneford v. Silas Mason Co.*, 300 U.S. 577) (emphasis added). For example, in *Armco Inc. v. Harvesty*, 467 U.S. at 642-643, this Court invalidated a wholesale tax, ruling that manufacturing and wholesaling were not sufficiently similar to serve as mutually exclusive "prox[ies]" for each other. *Accord Tyler Pipe Industries v. Dept. of Revenue*, 483 U.S. 232, 244 (1987).

The unconstitutional disparity is even greater under section 6007 than in *Tyler Pipe* and *Armco*. In the case of interstate drop-shipments, only the manufacturer and/or wholesaler who does business with an out-of-state retailer is liable for the section 6007 tax. In contrast, in entirely intrastate transactions, the manufacturer owes no sales tax; the in-state retailer is fully liable for the tax and collects it from the consumer. Hence, the incidence of the tax under section 6007 does not fall on the same class of taxpayers.

Such patent discrimination imposes significant burdens on Lyon. As if to maximize the disruption of Lyon's business, the Board imposes the section 6007 sales tax assessment on the retail sales price charged by Lyon's

customer. Lyon is not itself a party to the retail sales transaction and thus does not ordinarily know what prices its customers (retailers) charge their customers (consumers). The Court of Appeal sought to minimize this onus by observing that "all Lyon had to do was ask" its customers the question when the delivery was ordered. App. at 7a, fn. 3. This additional burden imposed only on interstate sales, however, creates the very disincentives to conducting business in interstate commerce that this Court's decisions condemn.

Because such burdens are unique to drop shipments made to customers of out-of-state retailers, section 6007 violates the "strict rule of equality" mandated by this Court's Commerce Clause decisions.

2. The Commerce Clause prevents the imposition of a tax where, as here, there is no nexus between the retail transaction and the taxing State.

The Court of Appeal's analysis of the nexus requirement--the first prong of the *Complete Auto* test--is also off the mark. Lyon concedes that California has sufficient nexus to impose a tax on the use or delivery of the goods in California, but that is not the tax assessed against Lyon here. The Board's assessment is based on the retail sales transactions occurring between the out-of-state retailers and in-state purchasers.

As the Court observed in *McLeod v. Dilworth Co.*, 322 U.S. 327, 331 (1943), "[t]hough sales and use taxes may secure the same revenues and serve complementary purposes, they are, as we have indicated, taxes on different transactions

and for different opportunities afforded by a State."[15] Moreover, for purposes of imposition of a direct tax such as the sales tax, the constitutional standard requires that a sufficient nexus exist between the state and the activity that the state seeks to tax. *See, e.g., Norton Co. v. Dept. of Revenue* 340 U.S. 534, 537 (1951). The decision in *Quill* establishes that California has insufficient nexus to attempt to tax a retail transaction where the retailer is not engaged in business in the taxing state. The drop shipment rule, which assesses a tax upon that same retail sale, thus fails the first prong of the *Complete Auto* test.

3. As applied, section 6007 is unconstitutional because it creates the potential for multiple taxation.

Finally, and contrary to the reasoning of the Court of Appeal, assessment of sales tax against Lyon violates the second prong of *Complete Auto* proscribing unfair apportionment. Fair apportionment is satisfied where a tax is "internally consistent" such that "the imposition of a tax identical to the one in question by every other state would add no burden to interstate commerce that intrastate commerce would not also bear." *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 185 (1995) (upholding an Oklahoma tax on the sale of bus tickets for travel originating in the state because if every state enacted an identical tax, each sale would still only be taxed once). By artificially imposing a tax upon Lyon at the wholesale level, however,

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[15] *See* Rotunda & Nowak, *Treatise on Constitutional Law: Substance and Procedure*, § 13.6, at 272 (2d ed. 1992) (discussing *McLeod v. Dilworth* and observing that "the Court refused to accept the contention that since a use tax would have been valid in the circumstances, a sales tax should be accepted as permissible in view of the fact that the economic effect would be the same").

the Board creates the risk of multiple taxation in contravention of the fair apportionment requirement.

In the present case, the tax assessed against Lyon under section 6007 is subject to being imposed on other parties involved in the drop shipments. If the retailer's customer to whom Lyon makes the shipment is not itself a "consumer" but is actually a retailer, the sales tax will be imposed on the retailer's customer as well as Lyon, the drop shipper. Likewise, even if Lyon delivers goods to a consumer in California pursuant to a drop shipment and eventually pays a sales tax assessment, the consumer's use tax liability (section 6202) would be discharged only in theory because it has no way of knowing that the sales tax has been paid.[16] Such differential treatment exposes the unconstitutionality of section 6007 under the second prong of the *Complete Auto* test as well.

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[16] Under the California tax regime, a consumer's use tax liability is not extinguished without evidence of a receipt establishing that sales tax has been paid (*id.*) or other satisfactory evidence that sales tax has been paid. Section 6401. Here, the Board admits that it has not notified the consumers in the eleven drop shipment transactions that Lyon paid the sales tax and likewise admits that it has no knowledge or information that anyone else has notified the consumers. PA 69, 73-74.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 14, 1998

APPENDIX A

LYON METAL PRODUCTS, INC.,
Plaintiff/Respondent,

v.

STATE BOARD OF EQUALIZATION,
Defendant/Appellant.

No. A076008

Court of Appeal of the State of California,
First Appellate District,
Division Five

Filed October 24, 1997

Appellant State Board of Equalization (Board) contends the trial court erred when it held California's state sales tax was invalid to the extent it applied to drop shipments of goods from California wholesalers directly to retail customers inside California. We agree with the Board. Contrary to the trial court's conclusion, the drop shipments in issue here are explicitly made subject to the state retail sales tax by the provisions of the second paragraph of Revenue and Taxation Code[1] section 6007. Further, again contrary to the trial court's conclusion, section 6007 is not unconstitutional as a burden on interstate commerce in these circumstances. We, therefore, reverse and remand with instructions to enter judgment in favor of the Board.

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[1] All subsequent statutory references are to the Revenue and Taxation Code.

I. FACTS AND PROCEDURAL HISTORY.

Lyon Metal Products, Inc. (Lyon) brought this action contending that the drop shipment rule codified in the second paragraph of section 6007 is invalid on both statutory and constitutional grounds.

It is clear as a factual matter that the transactions in issue here would be subject to the state retail sales tax under the drop shipment rule, if that rule is valid. In each transaction, Lyon shipped goods subject to the retail sales tax from Lyon's California warehouse directly to a California retail customer. In each case, Lyon made this in-state delivery at the request of an out-of-state retailer, who had bought the goods at wholesale from Lyon and then resold them at retail to a California retail customer. This is a drop shipment--direct delivery of goods to a consumer thereof within this state from a warehouse within this state. Such drop shipment is defined as a retail sale subject to sales tax, i.e., the person making the delivery of goods, to a California consumer "shall be deemed the retailer of that property." (§ 6007, 2d ¶.)

The trial court, however, ruled the sales tax imposed under the drop shipment rule was invalid, on both statutory and constitutional grounds. The Board filed a timely appeal.

II. DISCUSSION.

We conclude the drop shipments in issue here were validly subject to the retail sales tax under section 6007, and that section 6007 is not unconstitutional. We, therefore, reverse the decision of the trial court and remand with directions to enter judgment for the Board.

Section 6007 defines the retail sales transactions which are subject to the California sales tax. The first paragraph of

section 6007 states the general rule that all retail sales are subject to the tax, except wholesale transactions made for subsequent resale to the ultimate consumer: "A 'retail sale' or 'sale at retail' means a sale for any purpose other than resale in the regular course of business in the form of tangible personal property."

The second paragraph of section 6007, which is more directly in issue here, specifically codifies the drop shipment rule by providing that a drop shipment is a retail sale subject to sales tax: "When tangible personal property is delivered by an owner or former owner thereof, or by a factor or agent of that owner, former owner, or factor to a consumer or to a person for redelivery to a consumer, pursuant to a retail sale made by a retailer not engaged in business in this state, the person making the delivery shall be deemed the retailer of that property. He or she shall include the retail selling price of the property in his or her gross receipts or sales price."

In order to properly explain the role this drop shipment rule plays in California tax laws, we must briefly summarize the history of California retail sales tax provisions.

California's retail sales tax was enacted in 1933. (Stats. 1933, ch. 1020, pp. 2599-2612.) The sales tax as originally enacted did not impose any tax on sales occurring outside California and, thus, gave consumers a strong incentive to buy from out-of-state retailers and avoid payment of the sales tax. The Legislature attempted to close this loophole by enacting the Use Tax Act of 1935, which imposed on the consumer of goods bought out of state a use tax, in an amount equal to the sales tax otherwise payable. (Stats. 1935, ch. 361, § 3, pp. 1298-1299.)

However, the sales tax as originally enacted also did not impose a sales tax on drop shipments, in which goods inside California are first sold at wholesale to an out-of-state

retailer, then resold to a consumer inside California, and then shipped directly from the California warehouse of the wholesaler to the California consumer. The drop shipment rule, as now codified in the second paragraph of section 6007, was enacted in 1939 to make such drop shipments within California subject to sales tax; and the rule has been in effect with minor amendments since 1939. (Stats 1939, ch. 679, § 2, subd. (c), p. 2171.)

California's sales and use tax laws, including the drop shipment rule, comprise an integrated system of taxation and "constitute a double filter designed to catch all transactions which result in tangible personal property joining the aggregate of capital assets within this state. . . ." *(Union Oil Co. v. State Bd. of Equal.* (1963) 60 Cal.2d 441, 449 *(Union Oil)*). California's system of sales and use taxes has repeatedly been upheld against statutory and constitutional challenges, so that "all tangible personalty sold or utilized in California is taxed once for the support of the state government." *(Southern Pac. Co. v. Gallagher* (1939) 306 U.S. 167, 171 *(Southern Pac.)*; see also *Union Oil, supra*, 60 Cal.2d at pp. 449-450.)

Since its enactment in 1939, the drop shipment rule in California has apparently never been subject to any successful legal challenge. We are unaware of any California decision, or any decision from a sister state with a similar law, which holds the drop shipment rule is invalid. The trial court principally based its ruling on a trial court decision from Connecticut. Unfortunately, that Connecticut trial court decision was one whose rationale was subsequently undermined by the Connecticut Supreme Court on appeal, in *Steelcase, Inc. v. Crystal* (Conn. 1996) 238 Conn. 571 [680 A.2d 289] *(Crystal)*. The *Crystal* decision indicates that a drop shipment rule, as applied to goods shipped from a warehouse inside the state and delivered to consumers inside the state, would be valid. (Pp. 295-296.) Because the goods

in *Crystal* were shipped from outside Connecticut and delivered to Connecticut consumers outside Connecticut, and in Michigan, the Connecticut drop shipment rule could not be applied in that case. (Pp. 297-298.) The *Crystal* decision, therefore, does not support the trial court's ruling in this case; it vitiates it. The goods in the case at bench were warehoused in California, shipped from California, and delivered to retail consumers in California, so the California drop shipment rule as stated in section 6007 could properly be applied.

The other out-of-state cases cited by the trial court were also inapposite on this point. For instance, New Jersey does not have a drop shipment rule codified by statute in language similar to that in the second paragraph of section 6007, so the decision of a New Jersey tax court in *Steelcase, Inc. v. Director, Division of Taxation* (1993) 13 N.J.Tax 182, is not on point here. In addition, the decision of the New Mexico Court of Appeals in *Siemens v. Taxation & Revenue Dept.* (N.M.Ct.App. 1994) 119 N.M. 316 [889 P.2d 1238] *(Siemens)*, cited by Lyon, did not involve the legal issue presented here of whether a drop shipment could be made subject to sales tax; *Siemens* instead dealt with New Mexico's unlawful refusal to accept a resale exemption certificate from another state, an issue not present here.

The trial court also invalidated the California drop shipment rule set forth in the second paragraph of section 6007, by relying erroneously on the general language of another section, section 6091.[2] In doing so, the court

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[2] Section 6091 provides: "For the purpose of the proper administration of this part and to prevent evasion of the sales tax it shall be presumed that all gross receipts are subject to the tax until the contrary is established. The burden of proving that a sale of tangible personal property is not a sale at retail is upon the (continued...)

ignored the Legislature's alternative definition of retail sale in the second paragraph of section 6007, codifying the drop shipment rule. This error was compounded by an interpretation of section 6091 as granting an exception from the sales tax on drop shipments. Section 6091 does no such thing. Rather, it provides a statutory presumption that "all gross receipts are subject to the [sales] tax until the contrary is established" *(ibid.)*, i.e., that *all* sales, including drop shipments, are presumed to be retail sales subject to sales tax. That presumption of section 6091 actually undermines and fails to support the trial court's ruling.

Lyon does not contend its purchasers certified the goods sold were purchased for resale. It does not dispute that the goods were delivered to consumers, and were not for resale by them. Lyon argues it established the wholesale nature of the subject transactions by showing the deliveries from Lyon's California warehouse to California customers were preceded by sales at wholesale of the same goods to out-of-state retailers. That showing did not rebut the presumption Lyon's deliveries of goods from its California warehouse to California consumers were taxable sales under the provisions of section 6091 and the drop shipment provisions of section 6007.

If Lyon had sought to establish that it had delivered the goods in question to California wholesalers for purposes of resale by those wholesalers to other customers from out of state, the presumption Lyon would be required to rebut under section 6091 might be relevant here; but that is not the case.

Finally, the trial court held the drop shipment rule in section 6007 was unconstitutional because it allegedly

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[2](...continued)
person who makes the sale unless he takes from the purchaser a certificate to the effect that the property is purchased for resale."

discriminates against interstate commerce. This ruling was also erroneous.

The trial court reasoned that since the sales tax is imposed on a transaction under the drop shipment rule only when the intermediate purchaser who first purchased the goods at wholesale is not engaged in business in California, the drop shipment rule, therefore, "discriminates" against out-of-state initial purchasers in violation of the interstate commerce clause of the federal Constitution. This elaborate argument, however, propounded to the trial court by Lyon, is a house of cards. It ignores the crucial fact that the same sales tax would be imposed on the transaction if it had happened entirely within California, i.e., a California consumer purchasing directly from a California wholesaler without involvement of an out-of-state intermediary, because the California wholesaler would charge the sales tax and forward it to the state, as Lyon should have done here.[3] Similarly, the same amount of tax would be imposed on the transaction if both wholesaler and retailer were outside the state, in the form of a use tax to be paid by the California consumer-customer. We fail to perceive any unconstitutional discrimination on these facts.

The federal Supreme Court has held that a state tax does not unconstitutionally burden interstate commerce if it satisfies four conditions: (1) The tax must be applied to an activity having a substantial nexus to the taxing state; (2) the tax must be fairly apportioned; (3) the tax must not be imposed in a discriminatory way on interstate commerce

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[3] Lyon contends it did not know how much sales tax to charge because it did not know how much the California consumer had agreed to pay the out-of-state wholesaler who bought the goods from Lyon. If that is true, however, then all Lyon had to do was to ask the wholesaler this question when the delivery in California was ordered.

only; and (4) the tax must be fairly related to services provided in the taxing state. *(Complete Auto Transit, Inc. v. Brady* (1977) 430 U.S. 274, 279.) The tax in question here satisfies every one of those conditions. As to the first factor, the goods were stored in a California warehouse and were delivered from there to California consumers, so there was a sufficient nexus with California. Second, there is no unfair apportionment or double taxation; all relevant events occurred in California, and the transactions will be taxed only once by California. Third, there is no discriminatory taxation, because the same tax will be charged on the transactions, and the same tax will ultimately be paid by the retail customers, whether as sales tax or use tax, regardless of the parties' residences. Finally, Lyon concedes the fourth factor is present here, since the tax is fairly related to services provided by the taxing state. Therefore, the tax in issue here is valid. (*Id.* at p. 279.)

The trial court also failed to defer to the practical realities of the situation, long recognized by the Legislature. The drop shipment rule was added by the Legislature in 1939 in order to plug a loophole in the tax code, under which parties could argue a sale was exempt from sales tax if an out-of-state intermediary was involved, even if the goods and the buyer were at all times within this state. The drop shipment rule is not discriminatory; it equalizes the tax burden on transactions without regard to whether they involve out-of-state intermediaries, just as does the California use tax. "California's exaction for the distribution of tangible personal property is the same, whether purchased within or without her borders or whether paid by the retailer or consumer. There is an equal charge against what is used,

whatever its source." (*Southern Pac., supra*, 306 U.S. at p. 172.)[4]

The trial court's decision here, if made widely applicable in California, would not end any alleged unconstitutional discrimination against out-of-state parties. It would, instead, simply recreate a reverse discrimination in taxation of in-state retailers, by reopening the gaping loophole which discriminates in favor of out-of-state intermediaries, that the Legislature validly closed. No statutory or constitutional basis, or any reason in common sense, exists for doing so.

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[4] This is, therefore, not at all a case similar to the recent decision of the federal Supreme Court in *Camps Newfound/ Owatonna v. Harrison* (1997) 520 U.S. __ [137 L.Ed.2d 852; 117 S.Ct. 1590] (*Camps Newfound*), which Lyon cites in a supplemental brief. In *Camps Newfound*, the high court invalidated a *property tax scheme*, not a sales tax, in which the property tax was charged to certain charitable entities only if they had clients from out of the state. There is no similar discrimination here, because the same tax will be charged on the transaction, whether as sales tax under the drop shipment rule or use tax imposed on the consumer, regardless of the parties' residences. (See *Southern Pac., supra*, 306 U.S. at p. 172.) Thus, the *Camps Newfound* case, like the other older cases cited by Lyon, is inapposite.

III. DISPOSITION.

The judgment of the trial court is reversed, and the matter is remanded with instructions to enter judgment in favor of the Board.

PETERSON, P.J.

WE CONCUR:

HANING, J.

JONES, J.

Trial Court: Superior Court of San Francisco County
Trial Judge: Hon. Donna J. Hitchens

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APPENDIX B

LYON METAL PRODUCTS, INC., Plaintiff,

v.

STATE BOARD OF EQUALIZATION, Defendant.

No. 971950

California Superior Court,
City and County of San Francisco,
Department Number Six

June 25, 1996

TENTATIVE DECISION

Summary of Facts/Procedural History

Plaintiff manufactures personal property and sells it at the wholesale level. The present case relates to eleven transactions in which plaintiff sold personal property to an out-of-state retailer. The retailer then sold the property to a third-party consumer who resided in California. Pursuant to an agreement between plaintiff and the retailer, plaintiff shipped the property directly to the third-party consumer. Based on these transactions, plaintiff was subjected to retail sales tax liability. Plaintiff contends that defendant improperly construed the relevant code. At trial, plaintiff established that with each sale, the property was resold in the ordinary course of business. (Trial exhs. 2A-2H.) As a result, plaintiff argues that it was improper to impose retail sales tax liability for these sales. In addition, plaintiff argues

that the imposition of the retail sales tax in the manner suggested by the State Board of Equalization (hereafter SBE) would be an unconstitutional burden on interstate commerce.

Discussion

I. Retail sales tax

Revenue and Tax Code section 6051 imposes a "sales tax" for retail sales.[1] During the relevant time period, "retail sale" was defined as follows:

> A "retail sale" or "sale at retail" means a sale for any purpose other than resale in the regular course of business in the form of tangible personal property. [¶] The delivery in this State of tangible personal property by an owner or former owner thereof or by a factor, or agent of such owner, former owner or factor, if the delivery is to a consumer or person for redelivery to a consumer, pursuant to a retail sale made by a retailer not engaged in business in this State, is a retail sale in this State by the person making the delivery. He [or she] shall include the retail selling price of the property in his [or her] gross receipts.

R&TC § 6007.[2] All sales are presumed to be retail sales, unless otherwise established:

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[1] The section provides, in relevant part, "[f]or the privilege of selling tangible personal property at retail a tax is hereby imposed upon all retailers at the rate of . . . ." R&TC § 6051.

[2] The second paragraph of R&TC § 6007 was modified in 1992, effective September 22, 1992.

> For the purpose of the proper administration of this part and to prevent evasion of the sales tax it shall be presumed that all gross receipts are subject to tax until the contrary is established. The burden of proving that a sale of tangible personal property is not a sale at retail is upon the person who makes the sale unless he [or she] takes from the purchaser a certificate to the effect that the property is purchased for resale.

R&TC § 6091.

Plaintiff's sales fit within the definition of retail sales contained in the second paragraph of section 6007. Defendant contends plaintiff may not prove that the sales were for resell to avoid the imposition of the sales tax.[3] This position is not logical.

At trial, plaintiff presented uncontroverted evidence that each of the 11 sales was for resale and was actually resold by the purchaser. As such, plaintiff contends that it rebutted the presumption and the imposition of the sales tax on these transactions, sales for resale, is improper.

The Court finds plaintiff's position to be correct. A party subject to a retail sales tax may prove that the sale was not a retail sale by showing that the personal property was sold to a party who, in turn, sold the personal property in the ordinary course of business. Regulation no. 1668, 1986 Cal.

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[3] Defendant asserts, without authority, that section 6091, which allows for the rebuttal of the presumption that all sales are retail sales, only applies to the first paragraph of section 6007.

Tax LEXIS 251, at *6-*7.[4] This conclusion is supported by the decision in *Steelcase Inc. v. Crystal* (Conn. Super.) 1994 WL 622100, in which a Connecticut court was faced with similar situation.[5] A sales tax was imposed on a Michigan

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[4] Regulation No. 1668 (c) provides:

> Other evidence to rebut presumption of taxability. A sale for resale is not subject to sales tax. . . . [I]f the seller does not timely obtain a resale certificate, the seller will be relieved of liability for the tax only if the seller presents satisfactory evidence that the specific property sold:
>
> (1) Was in fact resold by the purchaser . . . .

1986 Cal. Tax LEXIS 251, at *6-7; *see also* California State Board of Equalization (Oct. 6, 1965) Regulation No. 1668, Resale Certificates - Burden of Proof, Annot. No. 475.0020 ("Where a seller does not have a resale certificate on file, he [or she] may show by other evidence that the property was resold in the purchaser's regular course of business. This is true even though the purchaser does not have a seller's permit if he [or she] has made sufficient sales to be required to hold a seller's permit.")

[5] Connecticut's definition of retail sales is similar to California's definition: a retail sale is a sale not for resale, and specifically includes sales to out-of-state retailers with delivery to consumers in Connecticut. *Crystal*, 1994 WL 622100 at *2 (citing Conn. Gen. Stat. § 12-407(3)). Defendant notes that in the Connecticut provision the first and second sentences are in the same paragraph, while in California the sentences are in separate paragraphs. This distinction does not change the substance of the analysis.

(continued...)

manufacturer who sold to a retailer located outside of Connecticut.[6] *Id.* at *1. The retailer sold the product to a Connecticut consumer, and had the manufacturer deliver the product to the consumer in Connecticut. *Id.* The court found that the manufacturer was entitled to prove that the merchandise it sold was resold in the ordinary course of business. *Id.* at *4. The manufacturer met this burden, and thus the court found that the imposition of the sales tax on the manufacturer was improper. *Id.* In order to construe the entire statutory scheme in a consistent manner, the court found the second sentence in the definition of retail sale was modified by the first, in that the second type of retail sale was not a sale if the presumption was rebutted.[7] *Id.*

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[5](...continued)
Connecticut also has a presumption that all sales are retail sales unless a resale certificate is provided, similar to California's Revenue & Tax Code section 6091. *Id.* (citing Conn. Gen. Stat. § 12-410(1)).

[6] Defendant notes that the manufacturer in *Crystal* was shipping from an out-of-state facility, while plaintiff was shipping from an in-state facility. This distinction does not change the rule of *Crystal* as applied to this case.

[7] The court noted that "it is extremely common to structure sales and use taxes 'so as to exclude or exempt from tax many intermediate transactions in the economic process.'" In *Crystal*, 1994 WL 622100, at *2 (quoting II JEROME R. HELLERSTEIN & WALTER HELLERSTEIN, STATE TAXATION 14-2 (1992)). The court interpreted the Connecticut provision, which is parallel to R&TC § 6091, to include the assumption that "if a particular sale is genuinely a sale for resale, it is exempt from the sales tax." *Crystal*, 1994 WL 622100, at *3. The Court noted that the ability to rebut the presumption applied to the entire definition of retail sale. *Id.* The court noted that the State could impose a use tax on the consumer. *Id.* at *4.

The Court finds that plaintiff was entitled to prove, and did prove, that the sales in question were not retail sales. As such, it was improper to impose a retail sales tax on these transactions. Plaintiff is entitled to recover the full amount of taxes paid.

II. Interstate commerce

A tax on interstate commerce will survive a commerce clause challenge if the tax "[1] is applied to an activity with a substantial nexus with the taxing state, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State." *Complete Auto Transit, Inc. v. Brady* (1977) 430 U.S. 274, 279; *Quill Corp. v. North Dakota* (1992) 504 U.S. 298, 311. Plaintiff contends that, under the State Board of Equalization's interpretation of the tax, the tax violates the first and third prongs and is thus invalid. The Court finds that if the tax were applied as the SBE suggests it should be applied, it would be invalid under the commerce clause.[8]

A. Substantial nexus with California

Plaintiff notes that the tax, a retail sales tax, is unrelated to plaintiff's wholesale sale to an out-of-state retailer or delivery of the product to that retailer's customer. The tax, on its face, would not be imposed on either of these transactions. The tax relates to the sale by the out-of-state retailer to the California consumer. The State could not

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[8] Defendant contends that it is not attempting to tax interstate activity since it is only taxing a transaction from a California manufacturer to a California consumer. This argument ignores both transactions: (1) the sale by a California manufacturer to an out-of-state retailer; and (2) the sale by an out-of-state retailer to a California consumer.

impose the tax on the out-of-state retailer,[9] and plaintiff argues that defendant is attempting to circumvent this rule by imposing the tax on plaintiff. The Court finds that the tax, a retail sales tax, is unrelated to plaintiff's activity in the state and thus would be invalid under the interstate commerce clause.[10]

B. Discrimination against interstate commerce

Plaintiff notes that the tax, as interpreted by the State Board of Equalization, facially discriminates against in-state manufacturers who do business with out-of-state retailers.[11] "'[D]iscrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Systems, Inc. v. Dept. of Env. Quality* (1994) 511 U.S. 93, 114 S.Ct.

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9 "[A] vendor whose only contacts with the taxing State are by mail or common carrier lacks the 'substantial nexus' required by the Commerce Clause." *Quill*, 504 U.S. at 311 (fitting *National Bellas Hess, Inc. v. Department of Revenue of Ill.* (1967) 386 U.S. 753, into the framework of the *Complete Auto Transit* test).

10 Plaintiff concedes that the State could impose a use tax. Whether defendant could impose a duty on plaintiff to collect a use tax is not an issue which this Court need address. *See McLeod v. Dilworth Co.* (1943) 322 U.S. 327, 330-31 (noting the difference between a sales tax and a use tax and declining to consider whether a use tax would be valid when the state was imposing a sales tax).

11 For example, plaintiff would not be subject to the tax if it sold to an in-state retailer.

1345, 1350. "If a restriction on commerce is discriminatory, it is virtually *per se* invalid."[12] *Id.* (emphasis in original).

Defendant notes that a state may tax interstate commerce in accord with its fair burden in the use of the state. *Northwestern Cement Co. v. Minn.* (1958) 358 U.S. 450.[13] However, this does not allow a tax which discriminates against interstate commerce or is unrelated to the activity within the state.

Defendant contends that this tax is not discriminatory because it is imposed on the manufacturer or the retailer. However, the tax is only imposed on the manufacturer if it sells its product to an out-of-state retailer who, in turn, sells the product to a consumer in California. This would encourage manufacturers to do business with in-state retailers, and encourage retailers to become California residents to compete. Disparate tax treatment which creates an incentive to relocate within the taxing state violates the

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[12] The discriminatory tax is invalid "unless respondents can 'sho[w] that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.'" *Oregon Waste Systems*, 114 S.Ct. at 1351 (quoting *New Energy Co. of Indiana v. Limbach* (1988) 386 U.S. 269, 278). Defendant did not argue or establish facts sufficient for the Court to find this exception applicable. Any legitimate local purpose could be resolved by the imposition on the consumer of a use tax. *See Crystal*, 1994 WL 622100, at *4.

[13] In *Northwestern Cement Co.*, the Court noted that "a net income tax on revenues derived from interstate commerce does not offend constitutional limitations . . . ." 358 U.S. at 458-59. The Court explained that "the founders did not intend to immunize such commerce from carrying its fair share of the costs of the state government in return for the benefits it derives from within the State." *Id.* at 461-62

commerce clause. *Halliburton Oil Well Co. v. Reily* (1962) 373 U.S. 64, 72.[14] This position is supported by the decision in *Seteelcase, Inc. v. Director, Division of Taxation* (1993) 13 N.J. Tax 182, in which a New Jersey Tax Court was faced with application of a retail sales tax to a drop-shipment.[15] Under the New Jersey statute, a manufacturer would not be liable under the sales and use tax if it merely sold to an out-of-state dealer, and an out-of-state

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14 In Halliburton, Louisiana imposed a use tax for use of property used, but not purchased, in Louisiana. 373 U.S. at 65-66. The tax was "reduced by the amount of any similar sales or use tax paid on the item in a different State." *Id.* at 66. If the property was manufactured and used by Louisiana resident, then the tax did not include the labor and shop overhead. *Id.* at 67. These costs were included in the use tax for non-Louisiana residents who manufactured the property they were using. *Id.* The Court found that this discriminatory effect would encourage the manufacturer-user to relocate the manufacture of items used in Louisiana to Louisiana. *Id.* at 72. The Court held that this was an invalid interference with interstate commerce. *Id.*; *see also Koch Fuels, Inc. v. State Ex. Rel. Tax Com'n* (Okl. 1993) 862 P.2d 471 (finding tax exemption for out-of-state sales by in-state manufacturers discriminated against interstate commerce because an out-of-state manufacturer who made an out-of-state sale within the state was not entitled to the exemption).

15 An out-of-state manufacturer, with offices and agents in-state, sold to an out-of-state dealer, who in turn sold to in-state residents. *Steelcase*, 13 N.J. Tax at 184-85. The out-of-state manufacturer delivered to the in-state residents. *Id.* Defendant argues that this case is distinguishable because the manufacturer was located out of state and the shipment crossed state lines. Some of the shipments were from the in-state warehouse of the manufacturer. *Id.* at 186. In addition, the court noted that the manufacturer had a nexus with the state. *Id.* at 194. Thus, this distinction is without meaning.

dealer with no nexus to the state would not be liable for the tax if it sold to a state resident. *Id.* at 193. The court found that --

> [O]ffice furniture manufacturers with no nexus with New Jersey are given a competitive advantage because they can drop ship to New Jersey customers without obligation to collect New Jersey tax. This raises Commerce Clause questions and smacks of discrimination against interstate commerce. Although a transfer of possession may occur in New Jersey, it is not between seller and purchaser. In reality, the sale is between the non-nexus, out-of-state dealer and the New Jersey purchaser.

Id. at 194.[16]

The Court finds that the tax, as interpreted by the SBE, discriminates against interstate commerce and would thus be invalid.

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[16] Defendant argues that *Steelcase* was decided on statutory and not constitutional grounds. The impact of the constitutional analysis on the court's holding is unclear from the opinion. However, the findings and analysis are still persuasive. Defendant also argues that there is no parallel provision to section 6007 in New Jersey. However, there is a provision which provides that if a manufacturer is unable to produce a resale certificate, the sale is "'deemed a taxable sale at retail.'" *Steelcase*, 13 N.J. Tax at 191 (citing N.J.S.A. 54:32B-12(b)). Despite this language, and the defendant's argument to the contrary, the court found a regulation interpreting the statute, which allowed a party to otherwise prove that a sale for resale, was valid. *Id.* at 191-92.

III. Conclusion

For the foregoing reasons, the Court finds that the tax assessed was improper and Orders a refund of the entire amount.

Before the matter was submitted, the parties requested a Statement of Decision. Pursuant to Rule of Court 232(a) and Code of Civil Procedure section 632, this Tentative Decision shall become the Statement of Decision unless, within 10 days, either party specifies controverted issues or makes proposals not covered in the tentative decision.

Dated: 6-24-96

/s/ Donna Hitchens
DONNA HITCHENS
Judge of the Superior Court

APPENDIX C

LYON METAL PRODUCTS INCORPORATED,
Respondent,

v.

STATE BOARD OF EQUALIZATION, Appellant.

No. S066263

Supreme Court of California

Filed January 14, 1998

Respondent's petition for review DENIED.